

DATE: February 24, 1998

CASE NO: 97-STA-0016

WILLIAM ZURENDA  
Complainant

v.

J&K PLUMBING & HEATING CO., INC.  
Respondent

Appearances:

William Zurenda, *pro se*  
For Complainant

Joseph J. Steflik, Esq.  
For Respondent

Before: PAUL H. TEITLER  
Administrative Law Judge

### **RECOMMENDED DECISION AND ORDER**

This proceeding arises under the employee protection provision of the Surface Transportation Act, hereinafter the "Act", 49 U.S.C. § 31105 (West-1994), which prohibits covered Respondents from discharging or otherwise discriminating against employees who have engaged in certain protected activities.

Complainant filed his complaint on December 3, 1996, and on February 26, 1997, the Occupational Safety and Health Administration of the U. S. Department of Labor issued its investigative findings to the effect that the complaint had no merit. (ALJ 1).

Complainant requested a hearing on April 3, 1997 (ALJ 2), and an initial notice of hearing was issued on April 17, 1997. (ALJ 3). A hearing was held on May 15, 1997 at which time the parties advised that they had reached a settlement. However, the settlement was not acceptable to Complainant and he requested a continuance in order to obtain counsel. (ALJ 9). The hearing was held on July 22-23, 1997 in Binghamton, New York, at which time nine witnesses testified. Complainant's exhibits 1-35, Respondent's exhibits 1-12, and Administrative Law Judge's

exhibits 1-13 were admitted.<sup>1</sup> A second hearing was held on October 15, 1997 in Binghamton, New York to address allegations of attorney misconduct raised by Complainant against Respondent's attorney, Mr. Joseph J. Steflik. In an order dated December 8, 1997, a complete lists of exhibits which were admitted both at trial and post hearing was issued, to which no objections were received. Both parties submitted closing briefs.

### **THE LAW**

Surface Transportation Assistance Act, 49 U.S.C. § 31105 (1994), in pertinent part, reads as follows:

(a) Prohibitions.

- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--
  - (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
  - (B) the employee refuses to operate a vehicle because--
    - (I) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
    - (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
- (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the Respondent, and been unable to obtain, correction of the unsafe condition.

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<sup>1</sup> The following abbreviations will be used as citations to the record: ALJ = Administrative Law Judge's exhibits, CX = Complainant's exhibits, EX = Respondent's exhibits, and TR = transcript of the hearing.

## SUMMARY OF THE EVIDENCE

Complainant filed a complaint with the Department of Labor on December 5, 1996. (CX 3). He was a truck driver for Respondent and normally drove one of three vehicles, a Mack truck, a small Volvo, or a large Volvo.<sup>2</sup> He alleged that in November of 1994 he complained to Dean Kennedy, the shop foreman, about his assigned vehicle after receiving a ticket. He stated that the truck had a defective front end and the leaf springs had broken. Complainant stated that one and a half weeks after this incident, Mr. Kennedy told him that he would be discharged if he continued to complain about the vehicle. He stated that he then complained to the owner of the company, Wayne Jones, and the truck was then repaired. Complainant asserts that he was then laid off from November of 1994 until January of 1995. When he returned to work, Complainant asserted that he was told by Mr. Kennedy not to note any vehicle defects in the log books or he would be laid off. *Id.* at p.2. The actual ticket indicates that on June 23, 1994 Complainant was cited for the right side brake axle exceeding adjustment limits and it was noted that Complainant had an incomplete record of duty status for the previous seven days. (CX 34). Respondent had the brakes fixed as of June 24, 1994. (CX 19).

Complainant testified that another incident occurred in 1995 when he was stopped at a Department of Transportation stop in Norwich and was cited for no backup warning device and other complaints. (TR 204). When Complainant returned to the shop, he stated that he told Dean Kennedy about the problem and within a couple of days the truck was taken to Cook Brothers and repaired. (TR 205). Complainant testified that all of the problems couldn't be fixed but he wasn't aware why. (TR 206). He asserted that the backup device was not repaired and a brass-lined bushing on the compressor kept flying off, causing the truck to lose air pressure and stop. (TR 215-16).

Complainant filed a complaint relative to his pay scale in June of 1996 which resulted in a pay raise. (CX 3 at 3). In July of 1996, he spent two to three days in Troy, New York and stayed at the apartment furnished by the Respondent. (TR 363). He complained to Dean Kennedy afterwards that his co-workers were animals and it was like Animal House, the movie. (TR 364). He stated that the men were drunken slobs, he couldn't get a hot shower, and there was only one bathroom so other workers went to the bathroom in the bushes. *Id.* Complainant stated that he requested to drive back and forth rather than having to stay at the apartment. (TR 365). Complainant testified that when he was first told to he was going to New York again in November, he stated that he preferred not to go because of the living conditions. (TR 367).

On November 13, 1996, Complainant testified that he complained to Wayne Jones, Owner, about the condition of the Mack truck, stating that there was a problem with the clutch. (TR 217). Complainant then stated the incident occurred in early October. Complainant was given another truck to drive and the Mack truck was fixed two weeks later. (TR 221).

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<sup>2</sup> The Mack truck's license plate number is PD 5646, the small Volvo's license plate number is PD 4044, and the large Volvo's license plate number is PD 3828. (TR 380-81).

Complainant himself took the truck to Burr Trucking for repairs. (TR 222).<sup>3</sup> In November, he also told Mr. Jones that he was thinking of quitting due to the way he was treated by Mr. Kennedy. He stated that Mr. Kennedy didn't like it when he reported vehicle defects directly to Mr. Jones. *Id.* at 6. On November 13, 1996 Complainant told Dean Kennedy, the shop foreman, that there were problems with the Mack truck he was assigned to drive, specifically, a sticking clutch, no dash lights, a slashed tire, no backup warning device, and no tarp. (TR 226-228). Complainant testified that Mr. Kennedy told him to drive the truck or he would be fired. (TR 228). Complainant's copy of the daily log sheet for that day notes that he was driving vehicle, PD 5646, and that there was no heater or defroster. (EX 7). The original form, submitted to the Respondent, does not contain any such notation. (EX 8). The driver's inspection report for November 13, 1997 for the Mack truck indicates that the condition of the vehicle was satisfactory and this was signed by Complainant. (EX 9). There are handwritten notations that there was no heater or defroster, the blinker was not working, and there were no dash lights. Complainant admitted that these notations were made after he drove the truck and after he got into an argument with Dean Kennedy. (TR 420).

Complainant also testified that he asked to have new tires put on the big Volvo in September of 1996. (TR 229). He was told to wait until October of 1996 to purchase the tires. *Id.* Complainant stated that he did not check the tires with a wear gauge but states that there was too little tread left on the tires. (TR 230). He spoke to Mr. Mastronardi who told him to hold off until the beginning of the next month. (TR 232). Mr. Mastronardi did not threaten to fire him if he did not drive the truck. *Id.* The tires were replaced and Complainant resumed driving the truck. (TR 233).

On November 20, 1996, Complainant was assigned to make a 7:00 a.m. delivery of material to a job site in Pennsylvania on November 21, 1996, which would require him to get up at 4:30 a.m. (CX 3 at 3). He requested additional compensation for the assignment but was told he had to do it or the company would find someone else. He also complained to Mr. Kennedy about the large Volvo which he had been assigned to drive and stated it had problems with the heater, defroster, front end vibration, and the dash lights. *Id.* at 4. Complainant stated that Mr. Kennedy told him to drive the truck or he would be laid off. He logged the vehicle problems in his log book and gave it to Mr. Kennedy when he returned to the office at 9:30 a.m. at which time Complainant alleges that Mr. Kennedy stated "you're looking for trouble." *Id.* at 4. Complainant's log vehicle inspection report for this date notes that for the large Volvo there was no heat in the truck, the front end was vibrating, and there were no dash lights. It also notes that Complainant was told to drive the truck or go home. (EX 9). On this same day, Complainant was informed by Mr. Kennedy that he would be sent to RPI in New York for the following week and would be staying in the company apartment. Complainant informed Mr. Kennedy that the accommodations were inadequate and that other employees caused problems there by getting drunk. Complainant stated that he didn't think he would go on this assignment. (CX 3 at 5).

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<sup>3</sup> Complainant later testified that this incident involved the small Volvo as opposed to the Mack Truck. (TR 256).

The next morning, November 22, 1996, Complainant reported to work at 7:00 a.m. Mr. Kennedy told him that he had to report to the job assignment at RPI on November 25, 1996. Complainant refused due to the living conditions at the apartment, the amount of time he would be away from home, and due to the state of the trucks he would have to drive. Complainant noted that both trucks he could take were in disrepair as the Volvo had no heater or defroster and the front end vibrated. Mr. Kennedy told Complainant to take the Mack truck but Complainant stated that the Mack truck had a problem with the hydraulic clutch, no back-up alarm, no defroster heater, a bad tire, and no dash board lights. *Id.* at 5-6. Complainant also states that he informed Mr. Kennedy that he could not go to RPI because he had a doctor's appointment on November 25, 1996. *Id.* at 7, CX 17. Complainant also stated that the reason he would not go was due to the living conditions and the fact that he had a personality conflict with a project supervisor there. (TR 369). Complainant testified that he offered to drive back and forth to the work site in his own vehicle rather than having to stay at the apartment. (TR 369-70). Complainant testified that Mr. Kennedy told him that he would be laid off and instructed him to take material to a Johnson City job site. When Complainant returned at 9:00 a.m. he was told to speak with Al Rea, Manager of the Sheet Metal Department. Mr. Rea informed Complainant that he was being laid off for not going to the job site at RPI. Complainant left and he states that another driver was hired to replace him one to two hours later. *Id.* at 7. Complainant testified that he also complained about driving the truck on those days because there were no placards for hazardous materials and the truck was carrying flammable material and there was no tarp for the truck. (TR 197-198).

The daily log sheet for November 21, 1996 indicates that Complainant noted defects in the vehicle, PD 3828, the large Volvo. Specifically, he stated that the "front end is vibrating reel [sic] bad again, no heater or defroster." (CX 1). The log sheet for November 22, 1996 which Complainant filled out for the same vehicle also notes no dash lights, no heater or defroster and front end is vibrating. (CX 2). Complainant's vehicle inspection report for November 22, 1996 noted that vehicle PD 3828, the large Volvo had no heat or defroster, no dash lights, and the front end was vibrating. It also notes that Complainant was laid off for refusing to drive the Mack truck to Troy, New York. (EX 9). The Driver's daily log for November 22, 1996 states that there were no defects with the large Volvo but also states that there were no dash lights, no heater or defroster, and the front end was vibrating. (EX 7). Complainant admitted that he indicated the Volvo truck was satisfactory when he initially checked the truck and added the language about the defects after he was fired. (TR 436). Complainant testified that he did not get a chance to complain about the Mack truck in the log books before he was fired. (TR 163). He also stated that drivers drove with deficiencies that they did not note on the log books because they were afraid they would get fired if they noted the deficiencies. (TR 450).

On December 5, 1996, Complainant had a meeting with Victor J. Mastronardi and Al Rea. (EX 11). Complainant informed them that he would report alleged labor violations to the Department of Labor if they would not hire him back. Complainant was advised that if he was filing a complaint, Mr. Mastronardi would no longer speak with him and he should talk to their lawyer. Complainant was also advised at that time not to go onto the job sites, shop or office to

talk with employees during working hours without prior approval. A memo was posted to all sheet metal employees which indicated that Complainant was not to be on the property and was not to talk to company employees during working hour without prior consent from Al Rea or Victor Mastronardi. (EX 12).

Repair records from Burr Truck & Trailer Sales indicate that the lighting system in the Volvo was repaired on June 26, 1996 and the truck was inspected and passed the New York State inspection. (CX 32). The mechanic noted that the rear springs - rear pins were borderline along with the muffler and that the clutch linkage was worn. The clutch was repaired on September 18, 1996. (CX 32). On November 6, 1996, the Volvo was brought in due to front end shimmy and the lighting system. The front end was checked, air was put in the tires, the tires were balanced and the front shocks were replaced. The dash light rheostat was also replaced. (CX 18, EX 4). On January 23, 1997, the rear brakes were hanging and they were repaired. (CX 33). The Volvo's brakes were also repaired on April 17, 1997 along with the right front lens on the turn signals. (CX 18). On July 21, 1997, the fuel filters were changed due to a complaint of no power. *Id.* The Volvo passed New York State inspection on June 27, 1997. (CX 32).

A service call was made to the Mack truck at a plaza on the parkway on September 12, 1996 as the truck wouldn't "build air." The compressor was worked on. (CX 32). The truck was also repaired on December 19, 1996. (CX 18). The work order noted that the windshield wipers were checked and they were working O.K., the back up alarm system wasn't working and there were two light bulbs replaced in the dash board. *Id.* The defroster was also checked and it did not need to be repaired. A lift gate motor was also installed. On December 20, 1996, the blower was checked and it was noted that there was no low speed. The mechanic determined that a screw had rounded out and repaired the blower. The mechanic also replaced an eroded wire. *Id.* The odometer was repaired on December 26, 1996. *Id.* On February 7, 1997, it was determined that the lift gate motor was running all the time and a new motor was installed. (CX 32). The brakes were also adjusted and the steering drag link was replaced. *Id.* The truck then passed New York State inspection. On March 8, 1997, there was clutch noise and the mechanic installed a new clutch, pilot bearing, throw out bearing and pressure plate. *Id.* On July 21, 1997, the repair lift gate was not working and this was repaired.

Mr. Louis Edwards testified at the hearing. He was hired by J&K Plumbing & Heating on November 22, 1996. (TR 10-11). It was his impression that he replaced Complainant. His starting salary was \$7.50 an hour. Mr. Edwards testified that he usually would fix any repairs the trucks needed himself or would take the truck to a repair shop. (TR 14). He stated that most of the problems with the trucks were minimal. *Id.* He testified that the heater in the truck worked and the defroster was fixed. (TR 16).

James J. Klinge also testified at the hearing. He was hired by Respondent in July of 1990 and his current title is sheet metal fabricator. (TR 24). He also drives trucks as needed. *Id.* He stated that if there was a problem with a truck after he inspected it, he would fix the problem or tell Dean Kennedy. (TR 28). He testified that he drove the Mack truck and that the last time he

drove it the backup warning device, turn signals, heater and defroster were all working. (TR 58-59).

Robert H. Reeves, Jr. testified that he was hired by the Respondent in August of 1996. (TR 67). He stated that if he found a defect in a truck he went to Dean Kennedy with the problem and a call was made to have the truck serviced. (TR 69). No trucks were sent out when there was anything wrong with them. (TR 70). Minor repairs were conducted by the in-house mechanic. (TR 71). Mr. Reeves noted that at one point the clutch pedal on the small Volvo was sticking. (TR 69). At one point, there had been a problem with the Volvo defroster. (TR 91). He testified that he talked to Respondent's attorneys prior to the hearing and spoke on the phone several times with Complainant. (TR 76, 84). He testified that on the day Complainant refused to go to New York, there was no problem with the Mack truck. (TR 91). He took the Mack truck to New York after Complainant refused to go and stated that there were no mechanical defects on the truck. (TR 97). Mr. Reeves stated that there may have been a lighting problem on the odometer with one of Volvos. (TR 117). His pre-trip inspection of the Mack on November 25, 1996 revealed that all of the items checked were working properly. (TR 121).

When he was in Troy, New York, Mr. Reeves testified that he stayed at the company apartment which had three bedrooms. (TR 133). He described the conditions as like a frat house and stated that there were two men to a room with one bathroom for everyone. (TR 135). On one occasion in New York, he observed Complainant get into an argument with Dan Sullivan but he was unaware of the reason behind the argument. (TR 148). He stated that last time he took the Mack truck in for repairs was one month earlier for problems with the rear gate. (TR 138). Mr. Reeves stated that Respondent had three trucks and two drivers so if one truck was broken, the two drivers could still work. (TR 143-144). He testified that he has never received a citation for driving an unsafe vehicle. (TR 146-147).

Mr. Wayne Jones, President of J & K Plumbing and Heating, testified that he had ridden with Complainant at least twenty-five times. He recalled one instance where Complainant informed him that the gear shift kept popping out and stated that he instructed Complainant to take it to Burr Trucking to get it fixed. (TR 256). He testified that Complainant's job duties while in Troy, New York were to load the truck with scrap and construction debris from the job site, dump the load at the Cohes dump, and then return to the job site. (TR 258-61). He stated that drivers had permission to get any items they needed for the trucks. (TR 264). He stated that all trucks were placarded for hazardous materials as they carried a lot of argon and nitrogen. (TR 346). Mr. Jones testified that he had never been in the apartment the company provided employees in Troy, New York and both the project superintendent and the foreman on the project lived in the apartment and had no complaints. (TR 278, 282-283). Mr. Jones stated that when Complainant came to him on November 14, 1996, it was to complain about not receiving a raise when all other employees did. (TR 286). Mr. Jones stated he checked into this and determined that the reason Complainant hadn't received a raise was that he had already been given one that year, which he relayed to Complainant on the same day. *Id.* He also testified that he was aware

of two complaints regarding Complainant, one involving scaffolding that blew off a truck causing a \$1,000 loss. (TR 288).

Mr. Jones testified that he recommended that Complainant buy a heater jacket for the Mack truck and the Volvo and Complainant stated that he ordered the part from Burr Trucking but it was never picked up. (TR 291-92). Mr. Jones noted that if Complainant had ordered the parts, he should have picked them up. (TR 292). Mr. Jones testified that Complainant was a minimalist who had to be told what to do. (TR 294). It was his impression that Complainant quit working for Respondent when he was insubordinate in refusing to go to Albany under any set of circumstances. (TR 305). Generally, he found that Complainant was punctual. (TR 312). Mr. Jones stated that he would not hire Complainant back under any circumstances as he refused to go to Albany and that was part of his job. (TR 351).

Mr. Llewellyn Dean Kennedy, sheet metal supervisor for Respondent, testified that he supervised the three trucks in question. (TR 455-56). He stated that he hired Complainant and Complainant's job duties were to drive the truck, maintain the truck, pick up scrap and do light duties around the shop. (TR 458). The hours would fluctuate. Mr. Kennedy stated that Complainant's attendance was excellent and he was a good driver but he was marginal in his work around the shop. If a truck needed repairs, the standard practice was to take the truck to Burr trucking for repairs. (TR 460). He stated that it was his duty to ensure that the trucks were repaired and in good working condition. (TR 456). He stated that at one time both the Mack truck and the big Volvo had tarps and that Complainant purchased the tarp for the Volvo himself. (TR 484). He stated that the Mack truck did not currently have a tarp but all that was required by law was that load have to be secured and a tarp was not required. (TR 495). If the driver noticed a defect in the truck that could not be repaired by the in-house mechanic, he would need Mr. Kennedy's permission to take it to Burr trucking. (TR 460-61). As far as hazardous materials, Mr. Kennedy testified that he was aware of one occasion that Complainant stated he wouldn't drive the truck because he didn't have a "HAZMAT" but Mr. Kennedy noted that HAZMAT was not required for anything less than a certain number of pounds and five hundred pounds would be within the legal limit. (TR 547-48).

Mr. Kennedy testified that it was necessary for Complainant to go to New York on November 25, 1996 because Respondent needed the big truck up there to haul scrap. (TR 473). He stated that there were three other people who could have possibly gone, Bob Reeves, the other driver, Jim Klinge, the company mechanic, and Bill Ransom, who had a CDL license. He noted that Complainant had refused to go to Troy, New York on another occasion, due to the living conditions. *Id.* Complainant asserted that he had conversations with Mr. Kennedy in July in which he stated that he would not go back to "Animal House" but Mr. Kennedy did not remember these conversations. (TR 478). He did not send Bob Reeves instead of Complainant because Bob was a better hand around the shop than Complainant. (TR 486).

He testified that on November 22, 1996, he told Complainant that he was going to RPI the following Monday and Complainant would have to spend Monday, Tuesday, and Wednesday

there. (TR 509). Mr. Kennedy asserted that Complainant stated he had a problem with Dan Sullivan and Bill Ransom and wasn't going to go. (TR 510). He was aware of this conflict and had heard that Complainant had an altercation with Bill Ransom. (TR 538). Mr. Kennedy informed him that the only job assignment that was available to him was the one in New York and when Complainant again refused to go, Mr. Kennedy told him that his job depended on it. *Id.* Complainant then went to see Al Rea. When Complainant returned, Mr. Kennedy stated that he asked Complainant if he had changed his mind and he said no. (TR 511). Mr. Kennedy asserted that Complainant did not mention the condition of the trucks as a reason for refusing to go. *Id.* He stated that it was Al Rea who terminated Complainant. (TR 512). He stated that he never threatened to fire Complainant for refusing to drive the truck. (TR 514). Mr. Kennedy also testified that if he was aware that Complainant had a doctor's appointment for the week in question, it would have made a difference but he was not aware of this. (TR 565).

Albert Eugene Rea, Manager of the Sheet Metal Department, testified that he was Mr. Kennedy's supervisor. (TR 601). He stated the normal procedure regarding repair of the trucks was that the drivers would tell Mr. Kennedy and Mr. Kennedy would have the truck repaired. *Id.* If a vehicle broke down on the road, drivers had the authority to call a local service and have the truck repaired. Mr. Rea stated that Complainant was basically a very good driver who was very punctual. (TR 620). Complainant's job duties were to drive the truck and to help load scrap up onto the truck. (TR 629). He stated that the drivers are responsible for the trucks and the repairs. (TR 647).

Mr. Rea testified that on November 22, 1996 he had a meeting with Complainant after receiving a phone call from Mr. Kennedy who informed him that Complainant was refusing to drive to the work site. (TR 602-03). In the meeting, Complainant told him that he was upset that he hadn't received a raise in September along with the other employees. Mr. Rea responded that he had already gone to bat for Complainant in June and he had gotten a raise then. (TR 603-04). He informed Complainant that he had received numerous complaints about Complainant going to job sites and sitting in the truck and not helping unload the truck or do other work. Mr. Rea stated that Complainant also said that he wouldn't go to Troy, New York due to the living conditions and wouldn't live with the animals up there. (TR 605). Mr. Rea testified that he informed Complainant that that was where he was needed and he would be let go if he did not go. (TR 606). Complainant requested alternative accommodations in a motel on his own, but Mr. Rea stated that he informed Complainant that he could not treat him any differently than other employees. Complainant then asked if he could drive the company truck back and forth every day but Mr. Rea stated that would be too many hours of driving in addition to the added expense. *Id.* At that point, Complainant stated he wasn't going to go and Mr. Rea told him he was let go. He stated that he didn't fire Complainant because he wouldn't be able to collect unemployment, but laid him off. (TR 607). He testified that Complainant never mentioned that he had a doctor's appointment or mentioned any safety violations. (TR 607-08).

A week or so after this incident, Mr. Rea stated that he received a phone call from Complainant and they had a meeting. Mr. Mastronardi was also present at the meeting. At the

meeting, Complainant told them that if they didn't hire him back as a driver he was going to file a complaint with the Department of Labor.

Mr. Rea testified to the conditions at the company apartment. He stated that the men living there did drink some but he was unaware of the frequency. (TR 664). He stated that he went out for drinks with them and they acted responsibly. (TR 665). He was aware that Complainant had an argument with Bill Ransom in Troy. (TR 666).

Mr. Glen Kingle, a welder with Respondent, testified that he would perform minor maintenance on the large trucks, such as grease, oil, lights, bumpers, tailgates, and side racks. More substantial work was performed by Burr Trucking or Cook Brothers. (TR 678-79). He changed the backup switches on the Mack trucked periodically and also repaired the lights. (TR 695). He stated that the Mack truck had broken down twice, once when his brother was driving it. He testified that the power steering on the big Volvo had broken and the speedometer on one truck had to be replaced. (TR 707-09). He also had replaced a clutch lever on the big Volvo. (TR 711). Prior to Complainant's termination, Mr. Kingle noted that the Mack truck was functioning. It was repaired on December 19, 1996. (TR 710).

He was aware that Complainant had an argument with Bill Ransom while at the job site in New York. (TR 685-86). He also stated that he knew Complainant had talked to Mr. Jones and told him that things were wrong with the trucks. He further testified that Mr. Jones informed him to make sure that the trucks were fixed. (TR 687-88). Mr. Kingle stated that Complainant had ordered a heating jacket for the Mack through Burr trucking that was never picked up. He noted that the jacket was not a safety problem and the Mack truck heated well. (TR 689). He recalled that Mr. Kennedy was sometimes upset with Complainant for going to Wayne and asking for parts and for leaving to get parts without telling him where he was. (TR 690). He testified that no one ever told him to let a truck go out on the road in an unsafe condition. (TR 692). As far as the living conditions in the company apartment, he had stayed there and was aware that Complainant referred to it as "Animal House." (TR 724-25).

Mr. Victor Mastronardi, Vice President, testified that Complainant was employed twice over a three year period and was terminated on November 22, 1996. (TR 744). He approved the dollar amount of repairs and to his knowledge, never rejected a repair bill on any vehicle. (TR 747). He testified that the trucks were either fixed in-house or were sent to Burr trucking generally. (TR 762). In September of 1995, Complainant came to him and advised that he felt the tires needed to be replaced. (TR 763). Mr. Mastronardi stated that he asked Complainant if the tires could last another month because he could get better prices then. Complainant stated that he thought they could last another month and the tires were replaced one month later. (TR 763). In his opinion, Complainant was a very punctual driver and he assisted in trying to get Respondent's paperwork regarding DOT regulations in order. (TR 768). Mr. Mastronardi was the person who furnished the company's apartment in Troy, New York and he purchased ten beds and two sleeper sofas. (TR 781-82).

Mr. Mastronardi attended a meeting on December 5, 1996 between himself, Complainant, and Mr. Rea. (TR 750). At the meeting, Complainant stated he was not being paid properly and that he should be hired back or he was going to mail a letter to the Department of Labor. There was no discussion involving safety of the vehicles. (TR 751). After Complainant left, Mr. Mastronardi immediately typed a memo of the conversation, which indicated that Complainant stated he was going to go to the Department of Labor for labor rate violations if he was not hired back. (EX 11). The memo does not mention that safety violations were discussed.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Under the burdens of proof in STAA proceedings, complainant must show that he engaged in protected activity, that he was subjected to adverse action, and that Respondent was aware of the protected activity when it took the adverse action. Complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. An employee is protected if he "has filed any complaint or instituted or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order . . . ." 49 U.S.C. § 31105(a)(1)(A). *See Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec'y Mar. 18, 1987), slip op. at 3-4 (both internal and external safety complaints protected).

Section 31105(a)(1)(B) of the STAA also prohibits discriminatory treatment of employees in either of two "work refusal" circumstances. First, an employee may not be disciplined for refusing to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health . . . ." Second, discipline is prohibited for refusing to operate a vehicle "because the employee has reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." This second ground for refusal carries the further requirement that the unsafe condition causing the employee's apprehension of injury must be such that a reasonable person, under the circumstances, would perceive a bona fide hazard. Finally, § 31105(a)(2) stipulates that "the employee must have sought from his Respondent, and have been unable to obtain, correction of the unsafe condition." *Mace v. Ona Delivery Systems, Inc.*, 91-STA-10 (Sec'y Jan. 27, 1992):

Adapting the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) to the STAA, the plaintiff has the initial burden of establishing a *prima facie* case of retaliatory discharge. Once a *prima facie* case is established, one which raises an inference that protected activity was the likely reason for the adverse action, the burden of proof shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. If the defendant is successful in rebutting the inference of retaliation, the plaintiff bears the ultimate burden of demonstrating by a preponderance of the evidence that the legitimate reasons were a pretext for discrimination.

To establish a *prima facie* case of retaliatory discharge, the complainant must prove:

1. That he or she engaged in protected activity under the STAA;

2. That he or she was the subject of adverse employment action; and
3. That there was a causal link between his or her protected activity and the adverse action of the Respondent.

*Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987).

While a pro se complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the burden of proving the elements necessary to sustain a claim of discrimination is no less. *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec'y Oct. 10, 1991).

### Protected Activity

It is undisputed that Complainant was terminated on November 22, 1996 for refusing to go to a work site in Troy, New York. Complainant alleges that he refused to go due to safety violations pertaining to the truck he was assigned to drive. (CX 3). He also alleges that he refused to drive the large Volvo truck on November 21, 1996 due to safety defects but was told to drive or be fired and that he refused to drive the Mack truck on November 13, 1996 but was told to drive or be fired. Refusal to drive a truck is considered protected activity if either the operation of the truck would violate a federal safety regulation or if the driver had a good faith belief that the operation of the vehicle would cause serious injury to himself or the public. In *Doyle v. Rich Transport, Inc.*, 93-STA-17 (Sec'y Apr. 1, 1994), the Secretary noted that, at least in the Second Circuit, it must be shown that the condition complained about actually violated a federal safety regulation to establish a § 31105(a)(1)(B)(I) complaint.<sup>4</sup> See *Yellow Freight System, Inc. v. Martin*, 983 F.2d 1195 (2d Cir. 1993). There has been no evidence presented regarding which laws were broken on the dates in question. Complainant's specific allegations were that there was no heat in the big Volvo truck, the front end was vibrating and there were no dash lights. He also alleged that the Mack truck had a problem with the hydraulic clutch, there were no back up alarms, no defroster or heater, a bad tire, and no dash board lights. Some of these allegations, if true, would violate federal safety regulations. Specifically, a bad tire may violate 49 C.F.R. § 393.75 which sets out the requirements for tread depths and lists the regulations pertaining to tires. Additionally, 49 C.F.R. § 393.79 requires that every truck have a working defroster when conditions are such that ice, snow, or frost would be likely to collect.

The November 21, 1996 refusal involved the large Volvo. Complainant admitted that he initially indicated that the Volvo truck was in satisfactory condition on November 21 and 22, but later changed the log books to reflect defects after he was fired. (TR 436). The repair records for the big Volvo indicate that in June of 1996 the entire lighting system was checked and repaired. (CX 32). The repair records also indicate that on November 6, 1996, the front end shimmy was repaired, along with the entire lighting system. (CX 18). The next repairs on the

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<sup>4</sup> This case falls within the jurisdiction of the United States Court of Appeals for the Second Circuit as all of the alleged activity occurred within the state of New York.

Volvo did not occur until April 17, 1997, when the brakes were adjusted and the right front turn signal lens was adjusted. *Id.* Therefore, the front end shimmy and the lack of dash lights were repaired prior to Complainant's refusal to drive the truck on November 21, 1996. There are no repair records which indicate that the large Volvo ever had problems with its heater or defroster before or after this date and it passed inspection. Complainant alleges that he was in fact told to go home that day at noon because he refused to drive the truck. (Complainant's closing brief at 42). However, Complainant started worked at 4:00 a.m. that day and noon was the end of his eight hour day. (EX 13). Mr. Kennedy testified that he never told Complainant to drive the truck or be fired. And on November 22, 1996, Complainant again initially checked that the Volvo was in satisfactory condition. Complainant's allegations are less then credible on the issue of his refusal to drive the Volvo on January 21, 1996 because he indicated that the vehicle was in satisfactory condition both on January 21 and on the following day. The defects that were later added to his inspection reports were not consistent as he noted the lack of dash lights on the 22nd but not on the 21st on the back of his log sheets but the driver's inspection reports indicated no dash lights on the 21st. As noted above, the dash lights and front end shimmy had been repaired on November 6, 1996. Accordingly, Complainant has not proven that there was any condition that violated a federal safety regulation on the large Volvo truck on November 21, 1996, the date he refused to drive the truck.

He has also failed to establish that a reasonable person would have a reasonable apprehension of serious injury. As noted above, the defects involving the front end shimmy and dash lights were repaired prior to his refusal. The allegations regarding the heater and defroster are unsubstantiated. When Complainant complained about heating problems with both the Mack truck and the Volvo to Mr. Jones, Mr. Jones recommended that he order heater jackets which would assist with the heating. Complainant ordered the jackets himself but never picked them up. Therefore, he did not have a reasonable apprehension regarding the lack of heat or he would have inquired about the heater jackets or gone to pick them up. Additionally, Complainant did not make any claims that the weather was such on the 21st that the lack of a heater and defroster would cause a risk of serious injury. Therefore, I find that Complainant did not engage in protected activity under § 31105(a)(1)(B) on November 21, 1996.<sup>5</sup>

Complainant's other work refusals involved the Mack truck. The last time Complainant drove the Mack truck prior to being terminated was on November 13, 1996. (EX 7). The original log sheet indicates that the Mack truck was in satisfactory condition. The copy, kept by Complainant, states that there was no heater or defroster. As Complainant admitted that he added this entry after an argument with Mr. Kennedy and did not make the notation contemporaneous to his inspection, little weight can be given to the Complainant's copy of the log sheet. (TR 420). Complainant testified that he refused to drive the truck on this date, following an argument regarding an increased pay rate. He stated that he then complained of safety

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<sup>5</sup> Even if Complainant were able to show that he engaged in protected activity under these sections of the statute, he still would be unable to establish a *prima facie* case as the evidence does not show a causal link between his activity and his refusal to drive as noted below.

problems and threatened to log them in his book. He testified that he was then told to drive the truck or be laid off by Mr. Kennedy. Complainant did not drive the truck again prior to refusing to go to New York when he alleged problems with the hydraulic clutch, the back up alarms, no defroster or heater, a bad tire, and no dash board lights.<sup>6</sup> Repair records for the Mack truck indicate that the air compressor was fixed on September 12, 1996 and the sticking clutch was fixed on September 18, 1996. (CX 32). The windshield wipers were repaired on December 19, 1996 along with the lighting system and the back up alarm. The defroster was checked on the 19th also and the mechanic stated that it was O.K. and noted there was no low speed on the blower. (CX 18). The odometer was repaired on December 25, 1996. These records and Complainant's testimony indicate that the sticking clutch was fixed prior to the refusal to drive, the tires were replaced and the defroster was actually working. (CX 32, TR 233). The driver who took the Mack truck to New York in Complainant's place testified that there were no mechanical defects with the truck. (TR 97). However the backup alarm was not working along with the dashboard lights, as they had to be repaired on December 19th. Accordingly, I find that Complainant has established that operating the Mack truck on the dates in question would violate federal safety regulations. Therefore, Complainant engaged in protected activity under § 31105(a)(1)(B)(I) on November 22, 1996.

On November 13, 1996, Complainant alleges that he went to his supervisor, Dean Kennedy, and was told to drive the truck or be fired after he complained of a sticking clutch, no dash lights, a slashed tire, no backup warning device, and no tarp. However, Complainant's log sheets only indicate there was no heater or defroster and these notations were not contained on the original form. The actual inspections report indicated that the vehicle was satisfactory and handwritten notes at the bottom indicated that the heater/defroster wasn't working, the blinker was not working, and the dash lights weren't working. The handwritten portion also appears to have been made at a later date as the writing is off-center, and trails off the page. It also appears to be darker. I do not find Complainant's allegations as to this specific date to be credible. He testified that he had an argument with Mr. Kennedy prior to adding these notations and despite the fact that he had an opportunity to change the log, the notations only note one defect, the lack of a heater or defroster. As noted above, there is no evidence that supports this contention. Therefore, Complainant did not engage in protected activity on November 13, 1996 under § 31105(a)(1)(B)(I).

Complainant may also establish that he engaged in protected activity under § 31105(a)(1)(A) by establishing that he filed a complaint relating to a violation of commercial motor vehicle safety regulations. In this case, Complainant went above his direct supervisor's head on several occasions to complain directly to the company president about the safety

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<sup>6</sup> As Complainant did not drive the truck between November 13 and November 22, it is unclear how he was aware of the alleged problems with the hydraulic clutch, back up alarms, bad tire and dash board lights, none of which he noted on the 13th. He did not inspect the Mack truck on the 22nd, as he was assigned to drive the Volvo on that date and was refusing to drive the Mack on the 25th.

conditions of the trucks. He requested that a clutch be fixed on one of the trucks and he also went to request new tires for the trucks. While Complainant also complained to his own supervisor, Mr. Kennedy, about safety problems, these do not rise to the level of protected activity, as the normal course of business was for Complainant to inform his supervisor as to any repairs that needed to be made. However, going above the established chain of command is activity which amounts to an internal safety complaint. A driver's reporting of defects in the vehicles he has driven is an activity protected under § 31105(a)(1)(a). See *Hufstetler v. Roadway Express*, 85-STA-8, slip op. at 24 (August 21, 1986). His complaints related to motor vehicle safety standards as they addresses the condition of the tires as well as other problems. See *Perrine v. Poole Truck Line, Inc.* 85-STA-13 (Sec'y Mar. 11, 1986). This is sufficient to establish that Complainant was engaging in protected activity as STAA complaints do not need to refer to a particular safety standards in order to be protected. See *Davis v. H.R. Hill*, 86-STA-18 (Sec'y Mar. 1987).

#### Adverse Employment Action

In this case, it is undisputed that Complainant's employment was terminated on November 22, 1996 following his refusal to go to a work site in Troy, New York. While the Respondent may term this a layoff, adverse action was clearly taken against Complainant.

#### Causal Relationship between Protected Activity and Adverse Employment Action

To prevail on a STAA whistleblower complaint, a complainant initially must show that it was likely that the adverse action was motivated by a protected activity. *Roadway Exp., Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987); *Guttman v. Passaic Valley Sewerage Comm'rs*, 85-WPC-2 (Sec'y Mar. 13, 1992), slip op. at 9, *aff'd sub nom., Passaic Valley Sewerage Com'rs v. Dept. of Labor*, 992 F.2d 474 (3d. Cir. 1993). The respondent may rebut such a showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant then must prove that the proffered reason was not the true reason for the adverse action. *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d 407, 416 (1993).

In this case, Complainant's own testimony establishes that the reason he refused to go to Troy, New York was due to the living conditions at the company apartment and personality conflicts with workers there and this lead to his termination. This was unrelated to truck safety issues and was the reason he was terminated. Complainant testified that he offered to drive his own vehicle to and from the work site to avoid having to stay at the company apartment. Complainant's testimony on this issue is less than credible. Mr. Rea testified that Complainant wished to drive the Company truck back and forth every day. (TR 607). This makes much more sense because if Complainant drove his own vehicle to Troy in order to drive home every night, someone else would have to drive the company truck to the job site, which would eliminate the need for Complainant to be in Troy at all. Complainant repeatedly questioned witnesses about the living conditions at the apartment and whether they were aware of his disagreements with other workers in Troy. However, in establishing a *prima facie* case, a complainant need only raise the

inference that his engaging in protected activities caused the adverse action. The proximity in time between protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of a *prima facie* case. *Stiles v. J.B. Hunt Transportation, Inc.*, 92-STA-34 (Sec'y Sept. 24, 1993). In this case, Complainant's refusal to drive the truck is closely related in time to his termination, as it occurred on the same day. Complainant, however, cannot establish that Mr. Rea was aware of his protected activity on the date in question. The causation element is not established where a person taking adverse action had no knowledge of protected activity. *Gay v. Burlington Motor Carriers*, 92-STA-5 (Sec'y May 20, 1992).

Neither Mr. Kennedy or Mr. Rea were aware that Complainant's refusal was based upon a truck safety issue. Both testified that Complainant did not raise this issue on the date he was fired. Their testimony on this crucial issue is more credible than Complainant because as noted above, Complainant changed his log books at a later date. Complainant admitted in his closing argument that he did not discuss the conditions of the trucks with Mr. Rea. (Complainant's closing brief at p. 19). Instead, he addressed the living conditions at the company apartment and his lack of a raise as the reasons why he was refusing to go to Troy, New York. *Id.* As Mr. Rea was the one who terminated Complainant, if he was unaware of any complaints regarding safety violations, his decision to terminate Complainant was based solely on Complainant's stated reasons for refusing to go. This severs any causal link between Complainant's prior complaints and his termination. In addition, when Complainant went to speak to Mr. Mastronardi and Mr. Rea after his termination on December 5, 1995 he did not mention anything about truck safety issues according to the contemporaneous memo prepared by Mr. Mastronardi. (EX 11). Instead, he discussed his wages. I find this consistent with what Complainant stated he told Mr. Rea on the date of his termination. Complainant was supposed to go to Troy, New York on November 25, 1997 but refused to do so on November 22, 1997. He did not request that the trucks be fixed before he had to go to Troy. I find that this supports Respondent's contention that they were unaware that Complainant was refusing to drive the truck for safety reasons as he did not even attempt to have the Mack truck repaired before he refused to drive it. Accordingly, Complainant has failed to establish his *prima facie* case as he cannot establish that his termination was causally related to his safety complaints.

Even if Complainant were successful in establishing his *prima facie* case, I further find that Respondent's sole motivation in terminating Complainant was his refusal to go to the job site and the termination was not motivated by any of Complainant's safety complaints. Mr. Kennedy, who Complainant asserts was most upset by his complaints, appeared ready to give Complainant his job back and reluctant to terminate him on the date in question. He himself did not fire him, but told him to talk with Mr. Rea. After that conversation, he asked Complainant if he would change his mind. (TR 511). Mr. Rea was not even aware that Complainant's refusal to drive the truck was related to his safety complaints and it does not appear that Complainant was treated with animosity or hostility. Rather, based upon the given information, that Complainant wanted an additional pay increase and did not want to have to go to Troy, Mr. Rea told Complainant that he either had to go or he would be fired. A normal part of the driver's jobs was to go to work sites and Respondent apparently had a large job in Troy which necessitated the renting of an apartment

to accommodate their employees. It also appears that Complainant's "complaints" about his trucks were not treated as complaints within the company but simply repair requests and were handled in that manner. Accordingly, based upon all of the evidence of record, I find that Complainant's termination was not related to his protected activity but was based solely upon the stated reasons that he gave to Mr. Rea for refusing to drive the truck. I specifically find that Mr. Rea and Mr. Kennedy were more credible witnesses as to the events that occurred on November 13th and 20th of 1996. Respondent has proffered legitimate non-discriminatory reasons for Complainant's discharge. The reason Complainant was fired was not for his refusal to drive the truck nor his complaints regarding the trucks, but his refusal go to Troy, New York and stay at "Animal House". Accordingly, I find that Respondent had a legitimate non-discriminatory motive for terminating Complainant which was not motivated by his safety complaints in any manner.

I further find that there is no evidence that the legitimate reasons were a pretext for discriminatory actions. There does not appear to be any credible evidence that Respondent was upset by Complainant's internal safety complaints. Rather, it appears that it was Complainant's responsibility to keep the trucks he drove in satisfactory condition, and complaints were treated as requests for repairs. Respondent left the decision making process regarding repairs in the drivers' hands. The only person that Complainant asserts was upset by his raising of safety issues was his immediate supervisor, Mr. Kennedy. However, on the date of the termination, Mr. Kennedy appeared to be willing to give Complainant his job back if he would drive the truck. This was after Complainant went to Mr. Kennedy's supervisor. This action shows the lack of a discriminatory motive. Accordingly, even though Complainant has established that he engaged in protected activity and that adverse action was taken against him, he cannot establish the last required element, that there was a causal link between his protected activity and the adverse employment action.

#### Attorney and Witness Misconduct

Complainant alleges that several witness lied under oath and Respondent's attorney, Mr. Steflik, was guilty of misconduct by tampering with witnesses and encouraging them to give false testimony. A hearing was held on October 15, 1997 to allow Complainant to further address these accusations. He asserted that the interrogatories signed by Mr. Wayne Jones and Ms. Caryl Clapp contained false statements. (TR 889). Ms. Clapp testified that the statements contained on the interrogatories were true and that Respondent did not try to influence her answers. (TR 919). She further testified that she read the interrogatories and answered them as fairly as she could. (TR 938). Complainant presented no evidence that her answers were untruthful or that anyone influenced her. Therefore, this allegation of misconduct is without merit.

Mr. Wayne Jones testified that he dictated the answers to the interrogatories to his attorney and stated that no one influenced him. (TR 947-948). Complainant alleged that some of Mr. Jones' answers sounded as if they were written by someone else. (TR 955). However, Mr. Jones testified that he reviewed the answers before he signed them and stated that they were his answers. (TR 957-58). As there is no credible evidence that Mr. Jones was not truthful or that

the answers contained on the interrogatories were not his own, I find that this allegation is without merit.

Complainant alleges that Mr. Steflik had a conference with the witness prior to their testimony and he told the witnesses what to say. (TR 891, 897). He also alleged that Mr. Steflik improperly requested his tax returns. However, both Mr. Steflik and Complainant spoke with the witnesses prior to trial, as Complainant called several witnesses at home. There is nothing improper with a lawyer discussing the testimony of witnesses prior to trial, provided they do not counsel the witness to testify falsely. Model Rules of Professional Conduct, Rule 3.4(b) (1996). All of the witnesses testified that Mr. Steflik instructed them to tell the truth. (TR 76). Complainant's tax returns were discoverable as they pertained to mitigation of damages. He also alleges that Mr. Steflik told Mr. Reeves not to speak with Complainant. However, the Rule 3.4(f)(1) of the Model Rules of Professional Conduct provides that a lawyer may request that a person other than a client refrain from voluntarily giving relevant information to another party if the person is an employee of the client. Therefore, even if this allegation were true, it would not be unethical as Mr. Reed is an employee of Respondent. Accordingly, I find that there is no evidence that Mr. Steflik behaved improperly in this matter.

### **RECOMMENDED ORDER**

For the reasons set forth above, it is recommended that the complaint of William Zurenda against J & K Plumbing and Heating Co., Inc. under § 31105 of the Surface Transportation Assistance Act be DISMISSED.

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Paul H. Teitler  
Administrative Law Judge

Camden, NJ  
PHT/clb

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Administrative Review Board, United States Department of Labor, Room S-4309, 200 Constitution Ave., N.W., Washington, DC 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. *See* 55 Fed. Reg. 13250 (1990).